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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Siskiyou)

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCUS DANIEL HORTON,

Defendant and Appellant.

C062648

(Super. Ct. No.
MCYKCRBF090000693002)

Defendant Marcus Daniel Horton entered guilty pleas to assault with a caustic chemical and infliction of corporal injury on a cohabitant or parent of his child (Pen. Code, §§ 244, 273.5; further section references are to the Penal Code), in exchange for the dismissal of the remainder of the charges in the information and a grant of probation (conditioned, inter alia, on a maximum 90-day jail term). Pursuant to the agreement of the parties, the trial court expressly noted that it was not finding that the section 244 conviction was a "serious" felony within the meaning of section 1192.7, subdivision (c)(30). The trial court imposed an

aggregate sentence of five years, suspended its execution, and granted probation. Determining defendant had been in custody for 91 days (entitling him to conduct credits of 44 days), the court ordered him released from custody for the present case (with any additional credits over 90 days to be applied to the 180-day jail term he would be serving for a violation of probation in an unrelated case).

Defendant argues on appeal that the January 2010 amendments to section 4019 apply retroactively to his pending appeal, which entitles him to additional presentence custody credits. (Our miscellaneous order No. 2010-002, in which we deemed this issue to be included in all pending appeals without further briefing, was filed March 16, 2010, six weeks after his opening brief.) He also contends that two conditions of probation are overbroad and vague and thus unconstitutional as a matter of law. We affirm the order granting probation as modified.

In light of this appeal's limited focus, the circumstances underlying his convictions are irrelevant. We therefore omit any statement of the facts, beyond noting that in the course of a fight in defendant's home, defendant threw his girlfriend across the room, then later threw a cup of bleach that splashed in the eyes of not only a man with whom defendant was fighting but also the eyes of defendant's girlfriend and their infant.

DISCUSSION

I

Custody Credits

Although defendant has completed the jail term that was a condition of his probation, and may never serve any future term of imprisonment if he adheres to the remaining conditions of his probation, the issue of his entitlement to additional conduct credits for presentence custody is not an abstract question in this appeal from the order granting probation. Issues regarding his sentence are not cognizable in a subsequent appeal from a revocation order (*People v. Mitchell* (1981) 125 Cal.App.3d 715, 718; *People v. Hawkins* (1975) 44 Cal.App.3d 958, 968), and any credits in excess of his term of imprisonment can be credited at a minimum rate of \$30 per day proportionally against any base fines (and penalty assessments) or restitution fines (\$ 2900.5, subd. (a); *People v. McGarry* (2002) 96 Cal.App.4th 644, 647-648.)

The Supreme Court has granted review to resolve a split in authority over whether the January 2010 amendments to section 4019 are retroactive. (*People v. Brown* (2010) 182 Cal.App.4th 1354 (review granted June 9, 2010, S181963) [amendments are retroactive]; *contra*, *People v. Rodriguez* (2010) 183 Cal.App.4th 1 (review granted Apr. 13, 2010, S181808).) A majority of the other published cases on the issue (none of which is yet final) concur in this result. (*People v. Pelayo* (2010) 184 Cal.App.4th 481 (review granted July 21, 2010, S183552); *People v. Norton*

(2010) 184 Cal.App.4th 408; *People v. Landon* (2010) 183 Cal.App.4th 1096 (review granted June 23, 2010, S182808); and *People v. House* (2010) 183 Cal.App.4th 1049 (review granted June 23, 2010, S182813).) *People v. Hopkins* (2010) 184 Cal.App.4th 615 (review granted July 28, 2010, S183724) and *People v. Otubuah* (2010) 184 Cal.App.4th 422 (review granted July 21, 2010, S184314) are to the contrary.

Pending a determinative resolution of the issue, we adhere to our conclusion that the amendments apply to all appeals pending at the time of their enactment. (Cf. *In re Estrada* (1965) 63 Cal.2d 740, 745 [amendments that lessened punishment for crime apply to acts committed before passage, provided judgment is not final]; *People v. Doganiere* (1978) 86 Cal.App.3d 237; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [applying *Estrada* to amendments involving custody credits].)

Neither the information nor the probation report indicates that defendant has any prior felony convictions for a serious or violent felony (§ 667.5, subd. (c); § 1192.7, subd. (c)), and the trial court accepted the stipulation of the parties that the present conviction for a violation of section 244 was not a serious felony. Nor does it appear defendant is subject to registration as a sex offender. (§ 290 et seq.) As a result, defendant is not in the class of felons excepted from the additional accrual of custody credit. (§ 4019, subds. (b)(2) & (c)(2); § 2933.1.) With 90 days of actual custody that is attributable to his present case, he is now entitled to 90 days of presentence conduct credits rather than 44. (*Id.*, subds.

(b)(1), (c)(1) & (f).) We modify the order granting probation accordingly and direct the trial court to file an amended order reflecting the modification.

II

Conditions of Probation

In pertinent part, the conditions of probation required defendant "not [to] enter any place that maintains an on-sale liquor license" and "[n]ot [to] own or possess any dangerous or deadly weapon or chemical agent which is primarily used to impair or incapacitate." Defendant did not object to these conditions in the trial court.

Defendant contends he may challenge these conditions for the first time on appeal because he is making arguments that involve pure questions of law capable of correction without reference to the particular facts of his case. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888 [stating exception to forfeiture of challenges to probationary conditions under *People v. Welch* (1993) 5 Cal.4th 228 (*Welch*) absent contemporaneous objection].)

To the extent defendant asserts that he must reasonably know that a place maintains an on-sale liquor license (i.e., one which allows for the purchase and consumption of alcohol on the premises (Bus. & Prof. Code, § 23396)), we agree that the issue is cognizable on appeal. We further agree that we must modify the condition to include a knowledge requirement. (*In re Sheena K., supra*, 40 Cal.4th at p. 892.) To the extent defendant tries to argue that the condition is unrelated to his offense, this obviously relates to the particular facts of his case and thus

comes squarely within the forfeiture rule of *Welch*. Given the close association between the abuse of alcohol and commission of criminal offenses, we reject his associated claim that trial counsel was ineffective for failing to make such an objection to the condition on this basis. (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

We draw a similar distinction with respect to the condition precluding dangerous or deadly weapons, or any chemical agents that are primarily used to impair or incapacitate. Once again, we will modify the condition to include a provision that defendant knowingly owns or possesses any dangerous or deadly weapon, and may not own or possess any chemical agents that he knows are used primarily to impair or incapacitate. We reject his claim that the latter is vague, as anyone of common intelligence can discern whether a chemical agent has an *intended* primary use for non-harmful purposes. However, the People do not object to a clarification of the condition for substances that might be on the margin, i.e., a clarification that would preclude a knowing use of the substance for the purpose of impairing or incapacitating another person.

Finally, defendant has forfeited his claim that trial counsel was ineffective for failing to object to the condition on the basis that it was unrelated to his offenses.

DISPOSITION

The order granting probation is modified to reflect an additional 46 days of presentence custody credit. The sixth

paragraph on page two is modified to order that defendant "Totally sustain from the use or possession of alcoholic beverages and may not enter any place that he knows or reasonably should know has an on-sale liquor license." The eighth paragraph on page three is modified to order that defendant "May not knowingly own or possess any dangerous or deadly weapon or a chemical agent that he knows or reasonably should know is primarily intended to impair or incapacitate another or knowingly use any chemical agent in a manner that could impair or incapacitate another." As so modified, it is affirmed. The trial court shall prepare an amended order granting probation reflecting these modifications.

HULL, J.

We concur:

SCOTLAND, P. J.

RAYE, J.